IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.510 OF 2006
IN
SUIT NO.962 OF 1981

The Shipping Corporation of India Ltd.
a Company incorporated under the
Companies Act, 1956, having its
registered office at Shipping House,
245 Madame Cama Road, Bombay 400 021. .. Appellant

V/s

1.Nirlon Synthetic Fibres & Chemicals
Ltd., a Company incorporated under
the provisions of the Companies Act
and having its registered office
at Nirlon House, 254-B, Dr.Annie
Besant Road, Worli, Bombay 400 025.

2.The National Insurance Company Ltd.,
a Company incorporated under the
Companies Act, Division No.VI, Flat
Nos.301-304, Sahyog, 58 Nehru Palace,
New Delhi 110 019, having its
registered office at 3 Middleton Street,
Calcutta 700 071, and a Divisional
Office No.VII Bharat House, 3rd Floor,
104, Bombay Samachar Marg,
Bombay 400 023.

3.Tulsidas Khimji Pvt.Ltd., a Company
incorporated under the provisions of
the Companies Act and having its
registered office at 46, Vir Nariman
Road, Bombay 400 023. .. Respondents

Mr.Rahul Narichania with Mr.Ravi Jiwani i/by M/s.Bhatt & Saldanha for the Appellant.

Mr.N.Engineer i/by Mathubai Jamietram for Respondent No.1.

CORAM: DR.S.RADHAKRISHNAN &
S.J.VAZIFDAR, JJ.

DATE : 31st July, 2006.

JUDGMENT:

1. By this Appeal, Appellant being the original Defendant No.1 is challenging the exparte decree dated 8th June 2006 passed by the learned Single Judge. The brief facts are that the Respodnent No.1 herein being

the original Plaintiff had filed the suit against the present Appellant (being the Defendant No.1) and the Defendant No.2 (being the National Insurance Company Limited) and the Defendant No.3 (being the Tulshidas Khimji Private Limited). In the said suit, the original Plaintiff had sought a decree against the present Appellant (being the Defendant No.1) in the sum of Rs.1,16,144.55 with interest thereon at the rate of 18% p.a. from the date of filing of the suit till the payment or realisation. Similarly, the original plaintiff had sought decree against the Defendant No.2 in the sum of Rs.4,00,164.89 with interest thereon at the rate of 18% p.a. from the date of filing of the suit till the payment or realisation.

2. The main grievance of the Plaintiff was that the Plaintiff had appointed Defendant No.3 as a Clearing Agent for clearing certain consignments of 222 Drums and 159 Drums. It appears that the said drums contained Monoethylene Glycol. The allegation of the Plaintiff is that some of the drums containing the aforesaid products were in damaged condition and in that behalf the Plaintiff had alleged that the net shortage was 29,244.86 Kgs. In the plaint it is alleged that the Plaintiff had obtained Customs Appriser Report as well as two Survey Reports with regard to the damaged drums. As far as the present Appellant being the Defendant No.1 is concerned, the allegation is that the damage is caused by present Defendant No.1 with regrd to 220 drums containing 51,092 Kgs. out of which the original

Plaintiff had suffered a loss of about 20,244.86 Kgs.as per the Survey Report as disclosed in the Particulars of Claim being Exhibit 'C' to the Plaint. In this Appeal we are only concerned with the claim against the Defendant No.1 being the Appellant herein.

3. It appears that the Appellant (Defendant No.1) had got the Written Statement prepared and declared on 3rd August, 2005 and had made varioius attempts right from 3rd August, 2005 to 15th September, 2005 by sending various letters to the learned Advocate for the original Plaintiff seeking their consent to file the aforesaid Written Statement. However, it appears that the original Plaintiff's Advocate had declined to give any consent and as such, the same could not be tendered in Court. However, the suit came to be listed for final hearing on 8th June, 2006 on which date the present Appellant sought to tender the Written Statement, however the learned Single Judge declined to take the Written Statement and passed the decree under Order VIII Rule 10 against all the Defendants. The order of the learned Single Judge dated 8th June, 2006 reads as under:-

> P.C. :
>
> 1. Though 25 years have passed since the institution of the suit, none of the Defendants have filed their written statement. Learned Counsel for the Defendants seek permission to file written statement at this stage. No ground for condonation of such a long delay is made out. Leave rejected.
>
> 2. Suit is only for recovery of money. Suit of

the Plaintiff is decreed under Order 8 Rule 10 of the Code of Civil Procedure against all the Defendants.

4. Being aggrieved by the aforesaid order of the learned Single Judge dated 8th June, 2006, the present Appeal has been filed by the Appellant (original Defendant No.1). The main contention of Mr.Narichania, the learned Counsel for the Appellant is that the learned Single Judge ought not to have automatically accepted the contentions of the Plaintiff without any evidence being tendered or any material being produced. The learned Counsel for the Appellant has also contended that the learned Single Judge has not even appreciated the pleadings in the Plaint and the material in support thereof, and has not given any findings with regard to the damages claimed. Mr.Narichania, the learned Counsel for the Appellant has contended that this being a suit for damages, the original Plaintiff was duty bound to lead the evidence and substantiate the same with the documentary evidence and also should have examined the Surveyors in support of the Survey Reports, upon which reliance is placed.

5. The learned Counsel for the Appellant has contended that the original Plaintiff had neither stepped into the witness box nor produced any record whatsoever to substantiate the claim of damages. In that behalf Mr.Narichania brought to our notice the scope of Order VIII Rule 5 and Rule 10 of the Code of Civil Procedure as interpreted by the Supreme Court in the case of

in Paragraph No.11. The relevant part of the said paragraph No.11 at page No.176 reads as under:-

> "... An objection to our above conclusion has been raised on the basis of the provisions of Order VIII of the Code of Civil Procedure. Rules 1, 5 and 10 of this Order have been recently amended by the Amendment Act of 1976. We find nothing in these rules which will support the contention urged on behalf of the Respondents. Rule 1 merely requires that the Defendant should present a written statement of his defence within the time permitted by the Court. Under Rule 5(2), where the Defendant has not filed a pleading it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the Plaint except against a person under disability but the Court may in its discretion require any such fact to be proved. Again under Rule 10 when any party from whom a written statement is required fails to present the same within the time permitted or fixed by the Court, the Court "shall pronounce judgment against him or make such order in relation to the suit as it thinks fit". It will be seen that these rules are only permissive in nature. They enable the Court in an appropriate case to pronounce a decree straightway on the basis of the Plaint and the averments contained therein. Though the present language of Rule 10 says that the Court "shall" pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of the plaint against the Defendant or to make such other appropriate order as the Court may think fit. **Therefore, there is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of the Plaintiff straightway because a written statement has not been filed.** Reference was made before us to sub-rule (1) of Rule 5. This sub-rule, however, has application only in a case where a pleading is filed but does not contain a specific or implicit denial of the averments contained in the plaint or other document to which it is a reply. Rule 5(1) cannot be made use of to sustain the contention that where there is no written statement the Court is bound to accept the statements contained in the Plaint and pass a decree straightway. These provisions of the Code of Civil Procedure, far from supporting the contentions of the Plaintiff that a decree on the basis of the plaint should follow a a failure to file the written statement, rather indicate a contrary position, namely, that even in such cases, it is a matter for the Court to exercise a discretion as to the manner in which the further proceedings should take place..." (Emphasis supplied by us).

6. Similarly, the learned Counsel for the Appellant has also brought to our notice another judgment of the Supreme Court in the case of **Balraj Taneja and Another V/s Sunil Madan and Another** - **AIR 1999 SC 3381,** wherein the scope of Order VIII Rule 5 and Rule 10 has been reiterated in paragraph Nos.14 and 29. Paragraph Nos.14 and 29 of the aforesaid judgment read as under:-

> "14. This Rule, namely Rule 10, was also amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act No.104 of 1976). Prior to its amendment, it was held in a number of decisions that the rule can be invoked only in those situations where the Court has required the defendant to file the written statement in terms of Rule 9 of Order 8. A few other High Courts had taken the view that this Rule would be applicable even to those cases where a written statement was required to be filed under Order 8, Rule 1, CPC. The conflict of decisions has been set at rest by providing specifically under this Rule that where a party from whom a written statement is required either under Rule 1 or Rule 9 of Order 8 fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him or make such order in relation to the suit as it thinks fit. Rule 10 thus governs both the situations where a written statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the written statement has not been filed by the Defendant, it will be open to the Court to pronounce judgment against him or make such order in relation to the suit as it thinks fit. It is to be noticed that if the written statement is not filed, the Court is required to pronounce judgment against the defendant. The words "against him" are to be found in Rule 10 of Order 9 which obviously means that the judgment will be pronounced against the Defendant. This rule also gives a discretion either to pronounce judgment against the Defendant or "make such order in relation to the suit as it thinks fit". These words are of immense significance, inasmuch as they give a discretion to the Court not to pronounce judgment against the defendant and instead pass such order as it may think fit in relation to the suit."
>
> "29. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor the Court should proceed to pass judgment blindly merely because a written statement has not been filed by

> the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a written statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8, Rule 10, CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicats that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8."

7. Applying the settled principles of law to the facts and circumstances of the present case, we are clearly of the view that the learned Single Judge has committed an error in decreeing the suit as far as the present Appellant is concerned. The judgment and order passed by the learned Single Judge decreeing the suit as far as present Appellant is concerned is therefore liable to be quashed and set aside and is accordingly quashed and set aside so far as present Appeallant is concerned. We make it clear that we are not interfering with the rest of the decree. As a consequence of the same, we restore the aforesaid Suit No.962 of 1981 on file so that the same can be disposed of on merits and in accordance with law.

8. In this case the Appellant had made various attempts to tender the Written Statement, however, as the learned Advocate for the Respondent No.1 had declined to give consent the same could not be tendered. Having regard to the facts and circumstances of this case and in the larger interest of justice, we however allow the Appellant to tender the Written Statement dated 3rd August, 2005. The said Written Statement of the Appellant (being the Defendant No.1), dated 3rd August, 2005 is accordingly taken on record and directed to be placed in the paper and proceedings of Suit No.962 of 1981.

9. Appeal is allowed in terms of the above, however with no order as to costs.

(DR.S.RADHAKRISHNAN, J.)

(S.J.VAZIFDAR,J.)